No. 80

In the

Supreme Court of the United States

October Term 1942

THE CHOCTAW NATION OF INDIANS,
Petitioner,

VERSUS

THE UNITED STATES AND THE CHICKASAW NATION OF INDIANS,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR RESPONDENT, THE CHICKASAW NATION.

THE CHICKASAW NATION,
By MELVEN CORNISH,
Its Special Attorney.

INDEX.

CITATION OF AUTHORITIES.

In the Supreme Court of the United States

No. 80

October Term 1942

THE CHOCTAW NATION OF INDIANS,

Petitioner,

vs.

THE UNITED STATES AND THE CHICKASAW NATION OF INDIANS,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR RESPONDENT, THE CHICKASAW NATION.

PROCEEDINGS IN THE UNITED STATES COURT OF CLAIMS AND THE SUPREME COURT OF THE UNITED STATES PRIOR TO THE GRANTING OF THE WRIT OF CERTIORARI HEREIN.

In the instant proceeding, the Supreme Court of the United States will, upon the writ of *certiorari* to the Court of Claims granted on October 12, 1942, review the decision of the United States Court of Claims, rendered on December 1, 1941, in the suit of *The Chickasaw Nation of Indians* v. *The United States and The Choctaw Nation of Indians*, No. K-336 (R. 13-28).

That original suit was filed in the Court of Claims, by authority of the Jurisdictional Act of Congress of June

7, 1924 (43 Stat., 537), and later Acts of Congress amending the same.

When that suit was filed, the United States was made the sole party defendant; and, by authority of Section 6 of the said Act of Congress of June 7, 1924, as follows:

> "The Court of Claims shall have full authority by proper orders and process to bring in and make parties to such suit any and all persons deemed by it necessary and proper to the final determination of the matters in controversy",

the Choctaw Nation was, upon Motion of the United States (filed on December 14, 1939, and allowed on January 2, 1940; R. 10), made a party defendant; and the "*petition in interpleader*" of the United States alleged:

> "That should the Court find that the allegations in plaintiff's petition are true, it would be apparent that the Choctaw Nation has heretofore unlawfully benefited to the extent of whatever money judgment might be found due plaintiff, and that any judgment herein should be against the Choctaw Nation and not against the United States of America" (R. 11).

Thereafter the title of that suit in the Court of Claims was as follows:

"*The Chickasaw Nation of Indians,*

Plaintiff,

vs.

The United States and
The Choctaw Nation of Indians,

Defendants."

That suit was tried in the Court of Claims; and, upon the consideration of the oral and documentary evidence taken and filed, and of the printed briefs and oral arguments on behalf of the parties, the Court of Claims ren-

dered its Special Findings of Fact, Conclusions of Law and Opinion on December 1, 1941, holding (R. 27-28) that,

> "We conclude, therefore, that the *arrangement of the Atoka Agreement whereby the Choctaw Freedmen were to be furnished their allotments at the expense of the Choctaws and not of plaintiff was incorporated into the supplemental agreement of 1902, as an obligation of the Choctaw Nation.* Since the Choctaw Nation is a party to this suit, having been made such pursuant to Section 6 of the Jurisdictional Act under which this suit is brought, we conclude that plaintiff is entitled to recover from the Choctaw Nation, but the determination of the amount of the recovery is reserved for further proceedings pursuant to Rule 39 (a)"
>
> "*The primary obligation being that of the defendant, the Choctaw Nation,* and there being no claim that that defendant is unable to satisfy whatever judgment may be rendered, we do not consider nor decide what is the liability, if any, of the defendant, the United States" (Italics ours).

Thereafter, and in due time, the defendant, the Choctaw Nation, filed its Motion for New Trial; *and no Motion for New Trial was filed by the defendant the United States.*

The said Motion for New Trial of the defendant, the Choctaw Nation, was denied on February 2, 1942 (R. 28); and, within the time allowed, its petition for writ of *certiorari,* for a review of the said decision of the Court of Claims, was filed in the Supreme Court of the United States.

The defendant, the United States filed no petition for writ of *certiorari,* but, prior to the hearing, it filed its "*Memorandum for the United States.*"

On October 12, 1942, the petition of the defendant, the Choctaw Nation, for writ of *Certiorari* for a review of the said decision of the Court of Claims, was granted.

The respondent, the Chickasaw Nation, respectfully contends that no such errors of law have been committed by the Court of Claims, in its said decision of December 1, 1941 (R. 13-28) as would merit a reversal or modification, and that the same should be affirmed; and that it is entitled to recover judgment against the Choctaw Nation for the *value* of its *common interest* in the lands taken and allotted to the Choctaw Freedmen, with "such addition thereto as may be required to produce the present full equivalent of that value paid contemporaneously with the taking" (295 U. S., 103).

Therefore, this Brief in support of such contentions, will consist of FIVE PARTS, as follows:

PART I,

STATEMENT OF THE CASE.

PART II,

ARGUMENT IN SUPPORT OF THE AFFIRMATIVE CONTENTIONS OF THE RESPONDENT, THE CHICKASAW NATION.

PART III,

ARGUMENT IN ANSWER TO THE CONTENTIONS OF THE CHOCTAW NATION.

PART IV.

ARGUMENT IN ANSWER TO THE CONTENTIONS OF THE UNITED STATES.

PART V.

CONCLUSION.

PART I.

STATEMENT OF THE CASE.

The respondent, the Chickasaw Nation, is refraining, in the instant proceeding, from making a separate "Statement of the Case" under this heading, for the reasons set out below.

The petitioner, the Choctaw Nation, has not complied with Revised Rule 41 of the Supreme Court (and a like Rule 99b of the Court of Claims), in applying for and receiving (to accompany its petition herein), a certified transcript of the record in the Court of Claims, consisting of "not only the *pleadings, findings of fact, conclusions of law, judgment and opinion of the court*", but also such "*other parts of the record as are material to the errors assigned*" (such as the evidence, oral and documentary), as a basis for any contention that *errors of fact* have been committed.

Therefore, it is assumed that *the facts*, as found by the Court of Claims, are final; and that the record filed herein (R. 1-28) will be examined, in the instant proceeding, for the purpose of determining whether the Court of Claims has committed such *errors of law* as would merit correction.

The former Rule 41 of the Supreme Court limited the record in the Court of Claims (which shall accompany a petition for writ of *certiorari*), to "the pleadings, findings of fact, judgment and opinion of the court, *but not the evidence*", thus limiting the review, upon writ of *certiorari* to alleged errors of law; but Revised Rule 41, now in force, permits the inclusion in such record, of such "*other parts of the record*" as would lay a basis for a review upon *the facts* as well as upon *the law*.

But, as stated, that Rule has not been complied with; and an examination of the record filed herein will show that it consists only of the *pleadings, findings of fact, conclusions of law, and judgment and opinion of the court;* and no such "*other parts*" of the record are included therein as would afford a basis for any contentions upon *the facts,* except those found by the Court of Claims, and appearing in the record filed herein.

In its petition for writ of certiorari to the Court of Claims, filed herein, the Choctaw Nation alleges *errors of fact;* but the record which accompanied such petition, affords no basis for such contentions, since no such "other parts" of the record in the Court of Claims were applied for and received and filed herein.

Will this Honorable Court, in the instant proceeding, consider and pass upon alleged *errors of fact,* upon the mere statements contained in the petition, and not supported by the record?

Therefore, the respondent, the Chickasaw Nation, will confine its statements upon *the facts,* throughout this Brief, to those found by Court of Claims, in its said decision of December 1, 1941 (R. 13-28); and it respectfully contends that this should also apply to the petitioner, the Choctaw Nation, and also to the United States.

PART II.

ARGUMENT IN SUPPORT OF THE AFFIRMATIVE CONTENTIONS OF THE RESPONDENT, THE CHICKASAW NATION.

(a) The Treaty of 1866, between the United States and the Choctaw and Chickasaw Nation; and was done, and what was not done thereunder, regarding the Choctaw and Chickasaw Freedmen.

The Choctaw and Chickasaw Freedmen were the persons held in slavery by the citizens and members of the Choctaw and Chickasaw Nations of Indians prior to the Civil War; and after the close of that war, the Treaty of 1866 was entered into between the United States and the Choctaw and Chickasaw Nations (14 Stat., 769); and under Article II of the Treaty (R. 14), slavery was abolished; and under Article III (R. 14-15), a plan was agreed upon whereby the Choctaw and Chickasaw Freedmen *might* be adopted as political citizens of the Choctaw and Chickasaw Nations, and given limited allotments of 40 acres each, out of the *commonly owned* lands of the Choctaw and Chickasaw Nations, *provided* the terms and *conditions of that Treaty were complied with.*

Such terms and conditions were as follows:

> That the named consideration of $300,000.00 agreed to be paid by the United States for the cession of the so-called "Leased District" lands (comprising some 7,000,000 acres of the western lands of the Choctaw and Chickasaw Nations, acquired and owned in fee simple and by Patent, and under the Treaties of 1820, 1825, 1830, 1837 and 1855, (and which will be hereinafter cited and appropriately commented upon), was to be held in trust by the United States, and not to be paid to, nor enjoyed by, said Nations, *unless and until* they should adopt said Freedmen, and give them 40

acres each of the *commonly owned* lands of said Nations;

That should the said Freedmen be not so adopted, and given 40 acre allotments, "within *two years* after the ratification of this Treaty", then the said sum of $300,000.00 "shall cease to be held in trust for said Nations, and held for the use and benefit" of *such of said Freedmen* as *the United States shall remove from said territory* in such manner as the United States shall deem proper, the United States agreeing, *within ninety* days from the expiration of the said *two years*, to remove from said Nations all of such persons * * * as may be willing to remove; those remaining or returning after having been removed * * * to have *no benefit of said sum of three hundred thousand dollars*, or any part thereof, but shall be on *the same footing as other citizens of the United States in the said Nations.*"

The said Freedmen were not adopted by said Nations, nor given 40 acre allotments, within the *two year period of limitation;* and none of the privileges which they *might have acquired* under the Treaty of 1866 were conferred upon, nor received by, them.

The suit of *United States* v. *Choctaw Nation, Chickasaw Nation and Chickasaw Freedmen* (193 U. S. 115-127), is decisive of what was done, and what was not done, under the Treaty of 1866, regarding the Freedmen.

In that suit, involving the rights of the Chickasaw Freedmen, under the "Supplementary Agreement" of July 1, 1902 (32 Stat., 641), the whole subject of the rights of Choctaw and Chickasaw Freedmen, *under later Agreements*, was reviewed; but the Supreme Court first made it plain that *no rights whatsoever* were ever acquired by either the Choctaw or Chickasaw Freedmen, under the Treaty of 1866.

The Supreme Court held:

> "The treaty is clear. The Indian Nations were to receive the $300,000.00 if they conferred upon the freedmen the rights expressed in the treaty. Failing to confer these rights, the sum was to be held in trust for all such freedmen, and only such freedmen as should remove from the territory. *The treaty was not complied with either by the Indians or the United States. No rights* were conferred upon the freedmen. * * * *"* (Italics ours.)

Following that decision, the Court of Claims then found (Finding 2; R. 15):

> "Article III was *not complied with within the two year period by either the Choctaws or the Chickasaws. The United States did not remove any freedman pursuant to the treaty.*" (Italics ours.)

(b) The attempt of the Choctaw Nation, in 1883, to give 40 acre allotments to the Choctaw Freedmen, out of the commonly owned lands, without the consent of the Chickasaw Nation, the other common owner of such lands.

It should first be said that any discussion under the above title would seem to be wholly academical, for the reasons set out below; and that the effect of the Act of Congress of May 17, 1882 (22 Stat., 68), and of the Act of the Choctaw Council of May 21, 1883 (Appendix B, Brief for the United States, pages 32 and 35), in so far as they attempted to confer rights upon the Choctaw Freedmen, to 40 acre allotments out of the *commonly owned* lands of the Choctaw and Chickasaw Nations, *without the consent* of the Chickasaw Nation, was, and is, *exactly nothing.*

Since, however, these Acts are discussed and stressed by both The Choctaw Nation and the United States, it is felt that there should be some answer to their contentions.

It has been shown (in the preceding subdivision "a") that the Supreme Court has held (193 U. S. 115-127), that "*no rights were conferred upon the Freedmen*" by the said Treaty of 1866.

Under that Treaty, both Nations were present and acting, and they did act by the adoption of a plan for validly providing for 40 acre allotments to the Choctaw Freedmen, out of the *commonly owned* lands, but under conditions which were never complied with; and no rights were conferred on the Freedmen.

Then came the Act of the Choctaw Council of May 21, 1883, which was passed some *fifteen years* after the expiration of the *two year* limitation period contained in the Treaty of 1866, in which it was attempted to confer *some rights* in the *commonly owned* lands upon the Choctaw Freedmen, by *acting alone* and without the "*joint action*" of the Chickasaw Nation, the other *common owner*.

The Act itself contains the admission that the Choctaw Nation could not *act alone*, so as to bind the Chickasaw Nation in matters affecting the *commonly* owned lands, for, in the Preamble of that Act appears the following:

> "Whereas, the Choctaw Nation adopted legislation in the form of a memorial to the United States Government in regard to adopting Freedmen to be citizens of the Choctaw Nation which was approved by the principal chief on November 2, 1880, setting further the status of said freedmen, *and the inability of the Choctaw Nation to prevail upon the Chickasaws to adopt any joint plan for adopting said freedmen.* * * *" (Italics ours.)

In passing that Act, the Choctaw Council was seeking to comply with the Act of Congress of May 17, 1882 (22 Stat.. 68) which had appropriated $10,000.00 (out of the

named consideration of $300,000.00 for the cession of the "Leased District" lands, under Article III of the Treaty of 1866) "for the purpose of educating Freedmen"; and providing that "before such expenditure", the Freedmen might be adopted "in accordance with said third Article".

This Act of Congress, did not affect, and could not have affected, the *commonly owned* lands, by striking down the safeguards contained in Article 1 of the Treaty of 1855 (11 Stat., 611) wherein it is guaranteed that the Choctaw and Chickasaw Nations may not be divested of any part of their commonly owned lands *"without the consent of both tribes."*

This Act (and the Choctaw Council Act of 1883), neither add to, nor take from, the basic rights of the two *Nations*, in the conservation and protection of the title and ownership of their *common lands*; and both the Choctaw Nation and the United States in the instant proceeding, seem to refuse to face, and to discuss, this basic contention, which runs throughout this Brief, and throughout this whole case.

True, the United States has the *"plenary power"* to *administer* the property and affairs of Indian Nations, but subject to *"pertinent Constitutional restrictions"*.

It may *take* such lands for its own use, or it may *take* them and bestow them *"upon others"* who have no legal right thereto; but, in doing so, it incurs the obligation to render *"just compensation"* therefor, since such would not be *administration*, but *an "act of confiscation"* (295 U. S. 103).

So that if, by the said Act of Congress of 1882 (and the Choctaw Council Act of 1883, passed in pursuance thereof) the *common interest* of the Chickasaw Nation in the

lands under consideration had been *taken* and bestowed upon the Choctaw Freedmen, that would be "*an act of confiscation*", for which the United States would be required to render "*just compensation*".

But, as stated, all of the foregoing is academical and mere speculation upon "*what might have been*"; and only for the purpose of showing, as is contended, that the laborious contentions of the Choctaw Nation and the United States, that such Acts of Congress of 1882, and of the Choctaw Council of 1883, are not well taken and without merit.

Nothing was done, or attempted, regarding allotments to Choctaw Freedmen, under those Acts; and, upon *the facts*, the Court of Claims has so found (Finding 3; R. 16), as follows:

> "No permanent allotments were made under this legislation"; and
>
> "The Chickasaws did not adopt their freedmen, and *objected to allotments to the Choctaw freedmen out of the commonly owned lands.*" (Italics ours.)

It would be profitless to speculate as to whether the Choctaw Freedmen acquired *political rights* under the Choctaw Council Act of 1883, since the Chickasaw Nation was not concerned with the operation of the *political government* of the Choctaw Nation.

The present concern is as to how, and under what power and authority, the Choctaw Freedmen validly acquired the 40 acre allotments which they now enjoy; and under what terms and conditions the Chickasaw Nation agreed that such allotment be given to them.

(The whole subject of how the lands of the Choctaw and Chickasaw Nations were acquired, and are owned

in common, and of what may be done by the United States by way of *administration*, and what may not be done by way of *confiscation*, will be more fully discussed in the following subdivision "e" hereof, and accompanied by citations of, and quotations from, applicable Treaty provisions and court decisions.)

Since the Choctaw Freedmen acquired no rights, either under the Treaty of 1866 (nor under the Acts of Congress of 1882, and of the Choctaw Council Act of 1883), they could only await the reconvening of the *only powers* that could validly *give* them 40 acre allotments; and *those powers* could only be exercised by the *common owners* of the lands (The Choctaw and Chickasaw Nations), acting by Treaties or Agreements.

The Treaty of 1866 was long since dead, in so far as the Freedmen were concerned; and there were no further reconvening of such powers until the "Atoka Agreement" of 1898 and the "Supplementary" Agreement of 1902, come to be made.

It was under those Agreements, solely and wholly, that the Choctaw Freedmen were *given* 40 acre allotments; and they derive no rights from any other source whatsoever.

Such Agreements of 1898 and 1902 will now be discussed, under the following subdivisions "c" and "d"; and the guarantys of the Choctaw Nation and the United States that the Chickasaw Nation would be compensated for its *common interest* in the lands allotted to the Choctaws, by a corresponding reduction of *Choctaw Indian citizen* allotments, will be set out and stressed.

(c) The "Atoka Agreement" of June 28, 1898 (30 Stat., 495); and the terms and conditions under which the Choctaw Freedmen were given allotments of 40 acres each, out of the commonly owned lands of the Choctaw and Chickasaw Nations; and the guarantys of the Choctaw Nation and the United States that the Chickasaw Nation would be compensated for its common interest in such lands, by a corresponding reduction of the allotments of Choctaw Indian citizens.

The controversy between the Choctaw and Chickasaw Nations (which began when the Choctaw Nation, in 1883 and *without the consent of the Chickasaw Nation*, attempted to confer some rights upon the Choctaw Freedmen, in the *commonly owned* lands of the *two Nations*), and continued throughout the intervening years, and still existed when the Choctaw and Chickasaw Original "Atoka Agreement" of April 23, 1897, come to be made.

The Choctaw Nation was anxious to "make good" upon, and to make legal, its attempt, in 1883, to give 40 acre allotments to the Choctaw Freedmen; and it realized that this could only be done by securing the *consent of the Chickasaw Nation*, in the form of a Treaty or Agreement which would be binding upon both the Choctaw and Chickasaw Nations, the *common owners* of the lands sought to be affected.

They appealed to the Chickasaw Nation to consent to the proposed 40 acre allotments to the Choctaw Freedmen; and the Chickasaw Nation still refused to assent to what had been attempted in 1883, and to what was presently proposed.

Finally, when it was proposed that the 40 acre allotments sought to be given to the Choctaw Freedmen, would be *deducted from the allotments of Choctaw Indian citizens*,

as the compensation of the Chickasaw Nation for its *common interest* in the lands proposed to be allotted to the Choctaw Freedmen, the Chickasaw Nation assented.

Accordingly, there was drafted, and incorporated into said Agreement, the following provision:

> "Provided that the lands allotted to the *Choctaw freedmen*, are to be deducted from the portion to be allotted under this agreement to the *members of the Choctaw tribe*, as as to *reduce* the allotments to the Choctaws by the value of the same and not *affect the value of the allotments to the Chickasaws.*" (Italics ours.)

This agreement was signed by the Commissioners for the United States and the Choctaw and Chickasaw Nations, at Atoka, in the Indian Territory, on April 23, 1897.

Thus the said provision became the guaranty of the United States and the Choctaw Nation, that the Chickasaw Nation would receive compensation for its *common interest* in the lands to be allotted to the Choctaw Freedmen, by having the same *deducted from the allotments of Choctaw Indian citizens*, and that the *allotments of Chickasaw Indian would not thereby affected.*

In that Agreement there was no proposition or suggestion from any quarter, that allotments should be given to the *Chickasaw Freedmen.*

The original "Atoka Agreement" was then sent on to Washington for ratification by the Congress; and it was ratified (with the amendments below set out and referred to), by the Act of Congress of June 28, 1898 (30 Stat., 495).

Chairman Dawes was not present when the Agreement had been negotiated and signed on April 23, 1897.

When such Agreement came up for ratification by the Congress, he insisted that provision be made for the *Chickasaw Freedmen*, as well as the *Choctaw Freedmen*, notwithstanding the fact that there was no contention from any quarter that the *Chickasaw Freedmen* had any right or claim to 40 acre allotments.

Such Agreement was amended by the insertion of the following provision relating to the *Chickasaw Freedmen:*

> "That the Commission to the Five Civilized Tribes shall make a correct roll of Chickasaw freedmen entitled to any rights or benefits under the treaty made in eighteen hundred and sixty-six between the United States and the Choctaw and Chickasaw tribes and their descendants born to them since the date of said treaty, and forty acres of land, including their present residences and improvements, shall be allotted to each, to be selected, held, and used by them *until their rights under said treaty shall be determined, in such manner as shall hereafter be provided by act of Congress* (Italics ours);

and since the *Chickasaw Freedmen* were to also receive *temporary* 40 acre allotments (which might ripen into permanent allotments) it became necessary to further amend the above quoted *allotment reduction* provision (which provided only for the reduction of *Choctaw Indian citizen allotments*, on account of *Choctaw Freedmen allotments*), contained in the Original "Atoka Agreement" (by providing also for the reduction of *Chickasaw Indian citizen allotments*, on account *Chickasaw Freedmen allotments*), as follows:

> "That the lands allotted to the Choctaw and Chickasaw freedmen are to be deducted from the portion to be allotted under this agreement to the members of the Choctaw and Chickasaw tribe so as to reduce the allotment to the Choctaws and Chickasaws by the value of the same."

Thus, the sum total of these two amendments was that, if the Chickasaw Freedmen ("in such manner as shall hereafter be provided by Act of Congress"), were found to be entitled to 40 acre allotments, such lands were to be deducted from *Chickasaw Indian allotments;* and the provision for deductions from *Choctaw Indian citizen allotments* (on account of *Choctaw Freedmen* allotments) remained the same, and was not thereby affected.

In other words, if the *Chickasaw Freedmen* were, thereafter, found to be entitled to 40 acre allotments, such lands were to be deducted from *Chickasaw Indian citizen allotments;* and the lands to be allotted to the *Choctaw Freedmen* were to be deducted from *Choctaw Indian citizen allotments*, as provided in the Original "Atoka Agreement".

When the Choctaw and Chickasaw "Supplementary Agreement" of 1902 (32 Stat., 641) was made, there was included therein a provision for a suit in the Court of Claims (with right of appeal to the Supreme Court), to determine the rights of the Chickasaw Freedmen, as guaranteed by the said "Atoka Agreement" of 1898; and, in that suit, the Court of Claims held that the Chickasaw Freedmen were without rights in the lands *temporarily* allotted to them; and, upon appeal, the Supreme Court affirmed that decision (193 U. S., 115-127).

The same Agreement also provided that, in the event of a decision adverse to the Chickasaw Freedmen, they should hold the lands theretofore *temporarily* allotted to them, as *final allotments;* and that a decree should be rendered in favor of the Choctaw and Chickasaw Nations, and against the United States, for the value of the lands so allotted to the *Chickasaw Freedmen.*

Such a decree was entered for $606,938.08 (the ap-

praised value of such lands); and that sum was appropriated by the Congress, and paid to the Choctaw and Chickasaw Nations, the *common owners* of such lands (in the legal and accepted proportions of *Three-Fourths* to the Choctaw Nation and *One-Fourth* to the Chickasaw Nation); and thus all questions regarding the *Chickasaw Freedmen* were forever settled.

But the questions regarding the *Choctaw Freedmen*, and the guarantys of the Choctaw Nation and the United States that the Chickasaw Nation should receive compensation for its *common interest* in the lands allotted to the *Choctaw Freedmen* (by a corresponding reduction of the allotments of *Choctaw Indian citizens*), remained unsettled; and were, in no wise affected by the payment for the *Chickasaw Freedmen* lands; and such questions (which arise and are to be settled in the instant proceeding) will now be further discussed.

When the *Chickasaw Freedmen* lands were paid for by the United States, as above shown, and *both* the Choctaw and Chickasaw Nations received compensation therefor according to their *common interests* in such lands, the *allotment reduction burden* imposed upon *Chickasaw Indian citizen allotments* by the above quoted provision, was lifted; but the allotment reduction burden imposed upon *Choctaw Indian citizen allotments*, because of *Choctaw Freedmen allotments*; remained the same.

Therefore, by striking from that provision all reference to the reduction *Chickasaw Indian citizen allotments*, because of *Chickasaw Freedmen allotments*, it would in effect, read as follows:

"The lands allotted to the Choctaw * * * freedmen are to be deducted from the portion to be allotted under this agreement to the members of the Choctaw * * * tribe so as to reduce the allotment to the Choctaws * * * by the value of the same";

and *that is the identical provision contained in the Original "Atoka Agreement" of 1897*, before it was amended by the Congress, and before the *Chickasaw Freedmen* were "brought into the picture".

It has been stated (under the heading in this Brief: PART I, *"Statement of the Case")*, that the respondent, the Chickasaw Nation, would, throughout this Brief (for the reasons therein set out), confine its statements of *the facts* to those found by the Court of Claims, in its said decision of December 1, 1941 (R. 13-28); and, for the purpose of showing that the same has been done, there are set out below the various findings of the Court of Claims upon *the facts* which bear upon that phase of the instant proceeding now under discussion, as follows:

Finding 4 (R. 16):

"The Chickasaw Nation, the Choctaw Nation, and the members of the Dawes Commission to the Five Civilized Tribes, on behalf of the United States, entered into an agreement on April 23, 1897, known as the Atoka Agreement, providing for allotments in severalty of their common lands and the sale or disposition of other common properties of the tribes. This agreement, as amended, was ratified and confirmed by the Curtis act (30 Stat., 495, 503), and made a part thereof, and was subsequently approved by a majority vote of the members of each of the tribes."

Finding 5 (R. 16):

"The original Atoka Agreement, between the Commissioners for the United States and the Choctaw

and Chickasaw Nations was negotiated at Atoka, in the Indian Territory and signed on April 23, 1897. Chairman Dawes of the Commission was not present."

"The agreement provided for forty-acre allotments to the *Choctaw freedmen* and contained a provision for the reduction of the allotments of *Choctaw Indian citizens* on account of the allotments to Choctaw freedmen, as follows:

> 'Provided that the lands allotted to the Choctaw freedmen, are to be deducted from the portion to be allotted under this agreement to the members of the Choctaw tribe, *so as to reduce the allotments to the Choctaws by the value of the same and not affect the value of allotments to the Chickasaws*'" (Italics ours).

"The Agreement contained no provision relating to allotments to the Chickasaw freedmen."

Finding 6 (R. 16-17):

"The agreement as ratified by the Act of Congress of June 28, 1898 (30 Stat., 495), was amended by providing for the 40-acre allotments to the Chickasaw Freedmen, but with the condition that such allotments were,

> '* * * to be selected, held and used by them until their rights under said treaty (the Treaty of 1866), *shall be determined, in such manner as shall hereafter be provided by Act of Congress*';

and the provision (set out in the preceding paragraph), for the *reduction of the allotments of Choctaw Indian citizens on account of allotments of the Choctaw Freedmen*, was amended by provision that the *allotments of Chickasaw Indian citizens be also reduced on account of allotments to the Chickasaw Freedmen*, as follows:"

> 'That the lands allotted to the Choctaw and Chickasaw freedmen are to be deducted from the portion to be allotted under this agreement to the members of the Choctaw and Chickasaw tribe so

as to reduce the allotment to the Choctaws and Chickasaws by the value of the same.'" (Italics ours.)

Then there was a further finding of *the facts* upon the same subjects, in the Opinion of the Court of Claims (R. 22), as follows:

"Chairman Dawes was not present at Atoka, and when the proposed agreement was sent to Washington, it was modified before being enacted by Congress in 1898 as a part of the Curtis Act (30 Stat., 495, 505), to give the Chickasaw freedmen as well as the Choctaw freedmen forty-acre allotments, the allotments to the freedmen of each tribe to be subtracted from the allotments to the Indians of that tribe. Each tribe was, therefore, to furnish the land for its own freedmen. As to the Chickasaw freedmen it provided that they should each be allotted forty acres "to be selected, held, and used by them until their rights under said treaty (the treaty of 1866) shall be determined in such manner as shall be hereafter provided by act of Congress.'"

Then, *the facts*, regarding the *Chickasaw Freedmen* suit, and the payment therefor, by the United States, are found by the Court of Claims, in its said Opinion (R. 24), as follows:

"The suit in the Court of Claims was filed, and the court held that the Chickasaw freedmen had no rights prior to the enactment of the supplemental agreement. It therefore rendered judgment against the United States in favor of the two tribes in the proportion of one-fourth to the Chickasaws, and three-fourths to the Choctaws for the value of the land allotted to the Chickasaw freedmen. The amount of the judgment was ultimately determined to be $606,936.08 which was paid to the tribes in the specified proportions."

(d) The "Supplementary Agreement" of July 1, 1902 (32 Stat., 641); and the reaffirmation of the provisions of the "Atoka Agreement" of 1898 for compensating the Chickasaw Nation for its common interest in the lands to be allotted to the Choctaw Freedmen.

The said "Supplementary Agreement" of 1902 contained the following provision, at the end of Section 40 thereof (Finding 8; R. 18):

> "*Provided*, That nothing contained in this paragraph shall be construed to *affect or change the existing status* or rights of the two tribes as between themselves *respecting the lands taken for allotment to freedmen*, or the money, if any, recovered as compensation therefor, as aforesaid." (Italics ours.)

What was the "*existing status*", as between the Choctaw and Chickasaw Nations, "respecting the lands taken for allotment to freedmen", and which was not to be *affected or changed*?

They were:

First, in the "Atoka Agreement" of 1898, the *Choctaw Freedmen* were given 40 acre allotments; but, coupled with that gift, were the guarantys of the Choctaw Nation and the United States that the Chickasaw Nation would be compensated for its *common interest* in the lands to be allotted to such Freedmen, by a *corresponding reduction of the allotments of Choctaw Indian citizens;*

Second, the rights of the *Chickasaw Freedmen* in the *commonly owned* lands to be *temporarily* allotted to them, were to be determined in such manner as "as shall be hereafter be provided by Act of Congress"; and

Third, there was imposed upon *Choctaw Indian citizen allotments the reduction burden*, on account of

Choctaw Freedmen allotments; and the same *reduction burden* was imposed on *Chickasaw Indian citizen allotments,* on account of *Chickasaw Freedmen* allotments.

It has been shown that such a suit was provided by the "Supplementary Agreement" of 1902; that such *Chickasaw Freedmen* were held to be *without rights;* that the United States paid the Choctaw and Chickasaw Nations for such lands, in the proportions of their *common ownership;* and thus, all questions relating to the Chickasaw Freedmen were forever settled.

Therefore, that which is left of the *existing status* (which was reaffirmed by the said "Supplementary Agreement" of 1902), was the *unredeemed and unenforced* guarantys of the Choctaw Nation and the United States, that the Chickasaw Nation would be compensated for its *common interest* in the lands to be allotted to the *Choctaw Freedmen,* in the manner agreed upon in the said "Atoka Agreement" of 1898.

This "*existing status*" has remained *unredeemed and unenforced* for now more than *forty years;* and notwithstanding the efforts of the respondent herein, the Chickasaw Nation, to bring about such redemption and enforcement, it was helpless in praying for and securing relief, until the passage of the Jurisdictional Act of Congress of June 7, 1924 (43 Stat., 573), and the later Acts amending the same, under which suit was filed against the United States (and the Choctaw Nation was later made a party defendant upon Motion of the United States, under Section 6 of that Act); and it now prays, in the instant proceeding, that the decision of the Court of Claims (R. 13-28) wherein judgment, in principle, has been rendered against the Choctaw Nation, and in favor of the Chickasaw Nation, will be affirmed.

The respondent, the Chickasaw Nation, is not permitted to discuss the evidence, oral and documentary, taken and filed in, and considered by, the Court of Claims, since the same are not a part of the record herein; and it must rely upon *the facts*, as found by the Court of Claims (and made a part of the record herein), which bear upon that phase of the case now under discussion; and such *facts* so found are as follows:

Finding 7 (R. 17):

> "The Chickasaw Nation, the Choctaw Nation, and the United States, entered into a further agreement on March 21, 1902 (32 Stat., 641). This agreement, known as the 'Supplemental' agreement, contained detailed provisions for the enrollment of the members and freedmen of the Choctaw and Chickasaw Nations, the appraisement and allotment of the common lands in severalty to the members and freedmen of the two tribes, the sale of the residue of such lands after allotments had been made and equalized, and the reservation and sale or disposition otherwise of the common properties of the two tribes, and the distribution of all moneys arising therefrom."

Finding 8, (R. 17):

> "The Supplemental Agreement provided in sections 36 to 40, inclusive, for a suit in the United States Court of Claims, with right of appeal to the Supreme Court, to test the rights of the *Chickasaw freedmen* to the commonly owned lands allotted to them under the Atoka Agreement. These sections appeared under the heading 'Chickasaw Freedmen'",

and then follow Sections 36, 37 and 40 (R. 17-18), providing for the suit to test the rights of the Chickasaw Freedmen, and for the payment, by the United States, for the lands *temporarily* allotted to such Freedmen, if they be found to be without rights in the lands theretofore *tem-*

porarily allotted to them; and the clause now under discussion, providing that the "*existing status*" of the tribes "*as between themselves,* respecting the lands taken for allotment to the Freedmen" shall not be *affected or changed,* occurs at the end of the said Section 40.

Finding 9 (R. 19):

"At the time of the negotiations for the Supplemental Agreement in Washington, D. C., in February and March 1902, *the Chickasaws insisted that the agreement contain some provision saving their rights not to have allotments to Choctaw freedmen made at the expense of the Chickasaws' interest in the commonly owned lands. After conference with the assistant attorney general, who was legal adviser to the Department of the Interior, it was agreed that the proviso to section 40 set out in finding 8 be included to protect their interests.*" (Italics ours.)

Finding 10 (R. 19):

"Suit was brought as provided in sections 36-40 of the Supplemental Agreement. Judgment for $606,936.08 was rendered against the United States and paid to the two nations, in the proportion of one-fourth to the Chickasaws and three-fourths to the Choctaws (38 C. Cls. 558; 193 U. S. 115)."

Then, in its Opinion (R. 26), the Court of Claims has found further *facts,* as follows:

"Plaintiff claims, *and we have found,* that in the negotiations for the supplementary agreement of 1902, *plaintiff asserted that it should not have to contribute to the allotments for Choctaw freedmen,* and that the proviso inserted in section 40 was drawn, in part, *for the purpose of protecting it from that burden.* The language is as follows:

"*Provided,* That nothing contained in this paragraph shall be construed to *affect or change the exist-*

ing status or rights of the two tribes *as between themselves* respecting the lands taken for allotment *to freedmen*, or the money, if any, recovered as compensation therefor, as aforesaid." (Italics ours.)

There is no merit in the contentions of opposing counsel that because this *proviso clause* occurs at the end of said Section 40, and under the caption of "Chickasaw Freedmen", it has no relation to the "existing status" of the then pending controversy respecting the lands taken for allotment to *Choctaw Freedmen*.

This *proviso clause* related to the lands taken for allotment to *Choctaw Freedmen*, as well as those taken for allotment to *Chickasaw* Freedmen. What subjects were included in the "*existing status*" which was not to be *altered or changed?*

They were: that any moneys paid by the United States for *Chickasaw Freedmen allotments* must be divided between the *two tribes*, upon the legal and accepted basis (which, as shown, was done); and that the *existing guaranty* of the Choctaw Nation and the United States for compensation to the Chickasaw Nation for its *common interest* in the Choctaw Freedmen lands (as contained in the "Atoka Agreement" of 1898), should also not be *altered or changed*.

Note that the language of the *proviso clause* is not limited to the lands taken for *Chickasaw Freedmen allotments*, but includes *all lands* taken for "allotment to *freedmen*".

Then, such were the *understandings* of the parties to the Agreement, as shown by the Findings of Fact of the Court of Claims below, after a consideration of the evidence taken and filed therein and bearing upon that phase of the case.

(e) The lands of the Choctaw and Chickasaw Nations are owned in common; and no part thereof may ever be sold or otherwise disposed of "without the consent of both tribes."

Since, in the Court of Claims below and in the instant proceeding, it is contended that the lands of the Choctaw and Chickasaw Nation are owned *in common*, and that *no part thereof* may be sold, or otherwise disposed of "*without the consent of both tribes*"; and the respondent, the Chickasaw Nation, feeling that the same may be helpful to the court, has deemed it advisable to briefly set out how such lands *were acquired*, and how they *are owned;* and what may be done by way of *administration*, and what may not be done by way of the *confiscation*, in bestowing the same "*upon others*" who have no rights therein, without incurring the obligation to render "*just compensation*" therefor.

Such will now be done; and the applicable Treaty provisions and court decisions will be cited and quoted, with appropriate comments thereon.

The lands of the Choctaw and Chickasaw Nation (which include the lands allotted to the Choctaw Freedmen, and here involved), were originally acquired (in *fee simple*, and evidenced by Patent, signed by the President, and attested by the Secretary of State) by the Choctaw Nation from the United States, in exchange of its lands east of the Mississippi River, and for other good and valuable considerations, including an agreement that the Choctaws would remove to the western lands thus acquired.

All of such transactions were consummated under the Treaties of 1820 (7 Stat., 210), 1825 (7 Stat., 234), and 1830 (7 Stat., 333), between the United States and the Choctaw Nation.

Then, when it became apparent that the Chickasaws would also be required to abandon their homes east of the Mississippi River and seek new homes in the west, the Treaty of 1837 (11 Stat., 533) was entered into between the Choctaw and Chickasaw Nations (with the approval and under the supervision of the United States), whereby the Chickasaw Nation purchased, for a valuable money consideration, a *common interest* in the western lands then owned by the Choctaw Nation; and the members of the Chickasaw Nation were also incorporated into the political government of the Choctaw Nation.

Dissensions of a political nature soon thereafter began to arise among the members of the two Nations; and, in order that such dissensions might be composed, the Treaty of 1855 (11 Stat., 611), between the United States and the Choctaw and Chickasaw Nations, was entered into, under which the Chickasaws were permitted to organize and operate their own separate *political government* upon the western portion of such lands; and, also, in that Treaty, were embodied the provisions of all preceding Treaties relating to the lands, and the title and ownership of such *common lands* was made so plain that no misunderstanding or controversy could ever thereafter arise.

In the Preamble to the Treaty is the following:

> "* * * and whereas, it is necessary for the simplification and better understanding of the relations between the United States and the Choctaw Indians, that all their subsisting treaty stipulations be embodied *in and comprehensive instrument.*" (Italics ours.)

Then follows the name of the Commissioners for the United States and the Choctaw and Chickasaw Nations; and then also follows Article 1 of the Treaty, defining, by

metes and bounds, the western lands of the Choctaw and Chickasaw Nations, and declaring and defining the terms and conditions under which the lands were owned, *in common*, as follows:

> "And pursuant to an act of Congress approved May 28, 1830, the United States, *do hereby forever secure and guarantee* the lands embraced within the said limits, to the *members of the Choctaw and Chickasaw tribes*, their heirs and successors, *to be held in common; so that each and every member of either tribe shall have an equal, undivided interest in the whole: Provided, however, No part thereof shall ever be sold without the consent of both tribes, and that said land* shall revert to the United States if said Indians and their heirs become extinct or abandon the same." (Italics ours.)

It is, therefore, contended that the Choctaw and Chickasaw Nations may not be divested of the title of *any part of such lands*, thus acquired and owned *in common "without the consent of both tribes"*; and that, if the lands allotted to the Choctaw Freedmen and here involved, were taken in any manner other than as guaranteed by the Treaty of 1855, (that is, *without the consent of the Chickasaw Nation)*, that would be a *taking*, and a *confiscation*, of the *common interest* of the Chickasaw Nation therein, in violation of *"pertinent Constitutional restrictions"*; and, in that event, the United States would incur an obligation to render *"just compensation"* for the loss thus sustained.

This would seem to have been settled in the case of *The United States* v. *The Creek Nation* (295 U. S. 103), and the other cases therein cited.

In that case, the lands of the Creek Nation were owned, in *fee simple*, and under Treaty provisions and Patent,

and under conditions identical with those surrounding the ownership of their lands by the Choctaw and Chickasaw Nations.

The lands involved in the *Creek Case* were *taken* from the Creek Nation, and bestowed upon the Sac and Fox Indians, by the adoption of an erroneous survey; and the United States was required to compensate the Creek Nation therefor.

The pertinent parts of that decision which would apply to the instant proceeding, if the United States, *acting alone*, had *taken* the lands under consideration, and bestowed them on the Choctaw Freedmen (as contended by opposing counsel), under the said Act of Congress of 1882, and of the Choctaw Council Act of 1883 (which are fully discussed in the preceding subdivision "f" hereof), are as follows:

> "The Creek tribe had a fee simple title, not the usual Indian right of occupancy with the fee in the United States. That title was acquired and held under treaties, in one of which the United States guaranteed to the tribe quiet possession. The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the *control and management* of that government. But this power to control and manage *was not absolute*. While extending to all appropriate measures for *protecting and advancing the tribe*, it was subject to limitation inhering in such a guardianship and to *pertinent constitutional* restrictions. It did not enable the United States to *give the tribal lands to others*, or to *appropriate them to its own purposes*, without rendering, or assuming an obligation to render, *just compensation* for them; for that 'would not be an exercise of guardianship, *but an act of confiscation.*' *Lane* v. *Pueblo of Santa Rosa*, 249 U. S. 110-113; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 307-308." (Italics ours.)

But, as shown in said subdivision "b" hereof, such lands *were not taken* and bestowed upon the Choctaw Freedmen under those Acts, and no such 40 acre allotments were ever made to them, except under, and by authority of, the said later "Atoka Agreement" of 1898, and "Supplementary Agreement" of 1902 (which are fully discussed under the preceding subdivisions "c" and "d" hereof); and, as stated, whatever is herein contended regarding the said Acts of Congress of 1882, and of the Choctaw Council Act of 1883, relates to what *might have been done*, but which *was not done*, under those Acts, and is wholly academical, and only in answer to what has been said by opposing counsel, in contending that said Acts are entitled to some weight, and have some bearing upon, the issues in the instant proceeding.

The 40 acre allotments to the Choctaw Freedmen were *legally and validly made*, under the said "Atoka Agreement" of 1898, and the said "Supplementary Agreement" of 1902; and their rights in the lands thus allotted to, and enjoyed by, them, were thus conferred upon them, and were derived from *no other source whatsoever*; but also, those same Agreements contain the unredeemed guarantys of both the Choctaw Nation and the United States, that the Chickasaw Nation would be compensated for its *common interest* the lands thus allotted to the Choctaw Freedmen, in the manner therein agreed to by all the necessary parties, and made a part of those same Agreements.

Since the United States did not *act alone*, in making allotments to the Choctaw Freedmen, but acted under valid Agreements to which both the Choctaw and Chickasaw Nations were parties, it incurred no liability for making such allotments; but it did incur an obligation to carry out the

other part of such Agreements, to reduce the allotments of Choctaw Indian citizens "*by the value*" of such allotments to the Choctaw Freedmen, as the compensation of the Chickasaw Nation for its *common interest* therein.

But its obligation, in that respect, was *secondary*, and subordinate to, the *primary obligation* of the Choctaw Nation (as held by the Court of Claims below in its said decision of December 1, 1941; R. 27-28); and under those conditions, the respondent, the Chickasaw Nation is not contending for a judgment against the United States, in the event such decision shall be affirmed in the instant proceeding, *but only against the Choctaw Nation.*

But if, in the instant proceeding, it shall be held that the *primary obligation* is not that of the Choctaw Nation, then, in that event, the respondent, the Chickasaw Nation prays that the Court of Claims below be instructed to render judgment against the United States.

(The liability of the Choctaw Nation and of the United States, is more fully discussed in the following subdivision "f" hereof.)

(Also, the *rule and measure* for the computation of such judgment, in the event the said decision of the Court of Claims shall be affirmed herein, is more fully discussed in the following sub-division "g" hereof.)

(f) The liability of the United States and the Choctaw Nation.

What is said under this subdivision is a repetition, more or less, of what has already been said throughout the preceding subdivisions of PART II this Brief; but the respondent, the Chickasaw Nation, deems it advisable, for clarity, to sum up, under this separate subdivision "f", its position and contentions regarding the liability, if any, of the United States.

The United States is the *guardian* of the Indians, and charged with the powers, duties and responsibilities of *administering* their property and affairs; and the same have been defined in the case of *Choctaw Nation* v. *United States* (119 U. S., 1-44), and other cases therein cited and quoted; and it is respectfully contended that the duties and responsibilities thus made plain by the Supreme Court will apply, not only to the United States, in being required to deal fairly and justly with its *own wards*, but also (in instances where it is so specifically authorized and directed, by Treaties or Agreements), to so *administer* their property and affairs as to require them to deal fairly and justly *with each other*.

In the present instance (in the said "Atoka Agreement" of 1898, and the "Supplementary Agreement" of 1902), the United States was *specifically authorized and directed:* (1) to allot 40 acres to each of the Choctaw Freedmen out of the *commonly owned* lands; and (2), to reduce the allotments of *Choctaw Indian citizens* "by the value" of such allotments to the Choctaw Freedmen, as the compensation of the Chickasaw Nation for its *common interest* in such lands.

The *first* authorization and direction was carried out; and the *second* was *not carried out*.

Yet, in failing to carry out this *second authorization*, it acted for the *benefit of the Choctaw Nation*, and to the *detriment of the Chickasaw Nation;* and, since the Choctaw Nation *was the beneficiary*, it may be said that the obligation to compensate the Chickasaw Nation for the loss sustained was the *"primary obligation"* of the Choctaw Nation.

If the United States, *acting alone*, had *"taken"* the

lands under consideration for its *own use*, or still *acting alone*, had bestowed such lands upon the *Choctaw Freedmen*, in violation of the rights of the Chickasaw Nation (the other owner of a *common interest* therein), it would seem to be clear that it would be required to render "*just compensation*" to the *Chickasaw Nation* for the loss thus sustained, because that would be "*an act of confiscation*".

(*United States* v. *Creek Nation*, 295 U. S. 103, and other applicable cases therein cited, and more fully discussed in the preceding subdivision "e" hereof.)

But, as has been shown, the United States *did not act alone*; and the sum total of what it did was to so *administer* the *common lands* as to carry out the agreements of both the *Choctaw and Chickasaw Nations* that 40 acre allotments be allotted the *Choctaw Freedmen*; but, in doing so, it failed to carry out the *guarantys* (of both the United States and the Choctaw Nation), that the Chickasaw Nation would receive the compensation to which it was entitled under said Agreements.

The Court of Claims below (R. 27-28), has held:

> "The *primary obligation* is that of the defendant, the *Choctaw Nation*, and there being no claim that the defendant is unable to satisfy whatever judgment may be rendered, we do not decide what is the liability, if any, of the defendant, the United States." (Italics ours.)

The respondent, the Chickasaw Nation agrees.

The Choctaw Nation is amply able to "satisfy whatever judgment may be rendered" against it; and, in view of this condition, the respondent herein, the Chickasaw Nation, prays that the said decision of the Court of Claims below (R. 13-28) be affirmed; and in that event, it has no

objection to the court below being directed to render a further judgment dismissing the petition of the respondent, the Chickasaw Nation, against the United States.

If, however, the said decision of the Court of Claims against the Choctaw Nation be reversed, then, in that event, the respondent, the Chickasaw Nation, prays that the Court of Claims below be directed to enter judgment against the United States.

(g) The measure, and the manner of computing, any money judgment that may be rendered in favor of the Chickasaw Nation.

If, in the instant proceeding, the decision of the Court of December 1, 1941 (R. 13-28) shall be affirmed, and, in "further proceedings", the Court of Claims shall "determine the amount of the recovery", under Rule 39 (a) of that Court, and final judgment shall be rendered therefor, the respondent, the Chickasaw Nation, respectfully contends that the measure and manner of computing such judgment, as the "*just compensation*" to which it is entitled, will be:

> *First*, "*the value of the lands* (the lands allotted to the Choctaw Freedmen) at the time of the *taking*" will be ascertained; and then there will be "*such addition thereto* as may be required to produce *the present full equivalent of that value paid contemporaneously with the taking*"; and "and interest (at the rate of 5% per annum) * * * is a reasonable rate as between the parties", for computing "*such addition thereto*"; and
>
> *Second*, the value of such lands having been so computed, the Chickasaw Nation will be entitled to a judgment for *One Fourth* of such total sum.

In support of that part of the *first contention* regarding "*the value of the lands at the time of the taking*" it would seem that the case of *Creek Nation* v. *United States*,

and the other cases therein cited (295 U. S. 103) are decisive; and the same has been fully discussed in the preceding subdivision "e" hereof.

Then, regarding that part of the *first contention* which relates to "such addition" as shall be added thereto, the same case lays down the rule and measure which shall apply, as follows:

> "But the *just compensation to be awarded* now should not be confined to *the value of the lands at the time of the taking* but should include *such addition thereto as may be required to produce the present full equivalent of that value paid contemporaneously with the taking.* Interest at a reasonable rate is a suitable measure by which to ascertain the *amount to be added.* The treaty of 1866, the act of 1889 and other statutes show that 5 per cent, per annum is a reasonable rate as between the parties here." (Italics ours.)
>
> (Citing *United States* v. *Rogers,* 255 U. S., 163-9; and *Seaboard Air Line* v. *United States,* 261 U. S. 299-306.)

In support of the *second contention,* it may be said that the legal and accepted basis for the division of the *common moneys* arising from the sale, or disposition otherwise, of the *common lands* of the Choctaw and Chickasaw Nations (as fixed and agreed upon in all of the Treaties and Agreements) is *Three Fourths* to the Choctaw Nation, and *One Fourth* to the Chickasaw Nation; and these are admitted by opposing counsel to be the correct proportions.

In the suit of *Choctaw Nation* v. *United States and the Chickasaw Nation,* No. J-231 in the Court of Claims (83 Ct. Cls., 140) wherein that question arose, it was so decided; and that decision was, in effect, affirmed by the Supreme Court, in dismissing the petition of the Choctaw Nation for writ of *certiorari* to the Court of Claims (300 U. S., 668).

(h) The admissions of the Choctaw Nation that the Chickasaw Nation was entitled to compensation for its common interest in the lands allotted to the Choctaw Freedmen; and the efforts of the Choctaw Nation to redeem its guaranty, in that respect; and the admissions of the United States that the existing controversy was real, and worthy of consideration and adjustment.

It is not contended that such *admissions* are sufficient, *standing alone*, to warrant a judgment in favor of the Chickasaw Nation.

But, it is respectfully and earnestly contended that such admissions most powerfully corroborate the contentions of the respondent, the Chickasaw Nation, in the Court of Claims below, and in the instant proceeding, that it is entitled to a judgment as its compensation for its *common interest* in the lands under consideration and that such were *the understandings of all of the responsible parties*, from the time such guarantys were given, in the Agreements of 1898 and 1902, to the present time.

Since no part of the evidence, both oral and documentary, presented to and considered by, the Court of Claims, appear in the record filed herein (R., 1-28), such evidence may not be now referred to, or commented upon.

However, the Court of Claims has *found the facts* upon that phase of the case, in its decision of December 1, 1941 (R. 13-28), as follows:

Finding 11 (R. 19)

"In that suit *(Choctaw and Chickasaw Nation vs. United States and Chickasaw Freedmen;* 38 Ct. Cls. 558), prior to the entry of final judgment on January 24, 1910, *the Choctaws* filed an 'Application for Additional Decree' in which they set out *that the Chickasaws were entitled to pay for their proportionate inter-*

est in the commonly owned lands allotted to the Choctaw freedmen and requested the court to enter a supplemental decree deducting from their proportionate share of the judgment one-fourth of the value of the jointly held lands allotted to the Choctaw freedmen and add that amount to the amount to be apportioned to the Chickasaw Nation under the judgment.

"No action was ever taken by the Court on this request." (Italics ours.)

Finding 12 (R. 19 and 20)

"On March 11, 1910, the Governor of the Chickasaw Nation wrote to the Commission of Indian Affairs requesting permission to employ separate counsel for the Chickasaw Nation and setting out in support of his request *the Chickasaws' claim for compensation for lands allotted to the Choctaw freedmen out of the common domain of the two nations without the consent of the Chickasaws* and pointed out that the Chickasaws had had no attorney to represent them at the time that judgment was entered in the suit brought pursuant to the Supplemental Agreement.

"March 16, 1910, denial of the request was recommended by the Commissioner of Indian Affairs *on the ground that in view of the admission of the Choctaws in their request for an additional decree, judicial action did not seem to be necessary to settle the controversy.* A final determination was promised *within ten days.* No such determination seems ever to have been made." (Italics ours.)

"No action was ever taken by the Court of Claims on this request" for the obvious and sufficient reason that the Jurisdictional Act of Congress of July 1, 1902 (Sections 36, 37 and 40; R. 17-18), conferred upon the Court of Claims no jurisdiction to consider and pass upon such controversy, in the suit therein provided for.

But, while relief, in that suit, was denied the Chickasaw Nation, yet the force and effect of the *understanding* of the Choctaw Nation, that its outstanding guaranty that the Chickasaw Nation was entitled to compensation for its *common interest* in the lands allotted to the Choctaw Freedmen was, in no wise, thereby lessened; and, it may be said that the then responsible representatives of the Choctaw Nation are to be commended for their fair and frank *admissions* of the rights of the Chickasaw Nation, and for their efforts to adjust and settle the same.

Then, in its said Opinion, the Court of Claims (in commenting on the *proviso* at the end of Section 40 (R. 18) of the "Supplementary Agreement" of 1902, wherein, as contended by the respondent, the Chickasaw Nation, the *allotment reduction* provision of the "Atoka Agreement" of 1898, was not *affected or changed*), is contained the following (R. 27):

> "It would have been strange for plaintiff to have, for no reason which has been suggested, yielded its position on the point of the Choctaw freedmen's allotments in 1902, *after having maintained it consistently for so long.* If it had so yielded in 1902, *it is impossible that the Choctaws would have, in 1909, and before the litigation mentioned in the paragraph had been completed, sought to present to the Chickasaws a large sum of money in compensation for the claim,* at a time when the Chickasaws were not even represented by an attorney. *We have no doubt that the Choctaws understood the proviso as we have interpreted it.*" (Italics ours.)

These comments, by the Court of Claims, may be *conclusions*, but, if so, they are *conclusions upon the facts*, and are based upon the evidence before it, and *upon its own*

Findings of Fact, as above set out; and, since such comments and conclusions (upon *the facts*, as found by the Court of Claims), may be helpful to the court, in the instant proceeding, they are herein set out, and stressed.

(i) The Chickasaw Nation has never received any compensation for its common interest in the lands allotted to the Choctaw Freedmen.

It has not received any compensation for its *common interest* in the lands under consideration; and it has been so found by the Court of Claims, in its said decision of December 1, 1941, in its *Finding 13* as follows (R. 20):

> "The Chickasaw Nation has never received any compensation for its common interest in the lands allotted to the Choctaw Freedmen, by the reduction of the allotments of the Choctaw Indian citizens, or by an adjustment or settlement otherwise."

PART III.

THE ANSWER OF THE RESPONDENT, THE CHICKASAW NATION, TO THE CONTENTIONS OF THE PETITIONER, THE CHOCTAW NATION.

The petitioner herein, the Choctaw Nation, stands upon its Briefs heretofore filed in support of its petition for writ of *certiorari* to the Court of Claims; and in addition it makes *four* other contentions in its Supplemental Brief now filed in the instant proceeding, and the same will now be answered in the order therein set out.

Answer to Proposition 1.

The Choctaw Nation contends that, because of the Acts of the Choctaw Council and the Chickasaw Legislature of 1904, providing for the settlement of "all existing matters between the Choctaw and Chickasaw Nations", the courts are precluded from considering and passing upon the issues arising in this suit under the Jurisdictional Act of Congress of June 7, 1924 (43 Stat., 537), wherein the Chickasaw Nation is praying for a judgment against the Choctaw Nation for its *common interest* in the lands allotted to the Choctaw Freedmen.

The respondent, the Chickasaw Nation, contends that, *at the time of the passage of such Acts in 1904*, the right of the Chickasaw Nation to receive compensation for its *common interest* in such lands *was not then a matter of controversy* between the two Nations.

The former controversy had been settled by the "Atoka Agreement" of 1898 and the "Supplementary Agreement" of 1902, by the incorporation therein of the *guarantys of the Choctaw Nation and the United States*, that the Chickasaw Nation would be compensated for its *common interest* in the

lands to be allotted to the Choctaw Freedmen *by a corresponding reduction of the allotments of Choctaw Indian citizens.*

The allotment of the lands of the Choctaw and Chickasaw Nations was, in 1904, then only in process of being made, and were not completed until *several years* thereafter.

Why should the Chickasaw Nation *then* assume that the guarantys contained in the said Agreements of 1898 and 1902 would not be respected and enforced, according to the specific terms and provisions of such Agreements?

The Chickasaw Nation was not only alert in demanding its rights, when it became known that they had not been enforced in the allotment of the lands, but, in 1909, the Choctaw Nation not only recognized its right to the compensation claimed, but did all within its power to make payment thereof. (Part II, subdivision "h", of this Brief.)

And then, even if the controversy (which developed *several years later*, when the Chickasaw Nation learned that the allotments of Choctaw Indian citizens had *not been reduced* because of *Choctaw Freedmen allotments)* what *power and authority* did the Choctaw and Chickasaw Nations (the *wards* of the United States) possess to deal with a subject which was provided for in Agreements to which they and the United States were parties, and which were ratified by Acts of Congress, and which only the United States had the power to enforce?

The whole *power and authority* to carry out the provisions of such Agreements was vested, solely and wholly, in the United States; and it could only then appeal to its *guardian* (the United States) for a means to enforce its rights.

That appeal resulted in the passage of the Jurisdictional Act of Congress of June 7, 1924 (43 Stat., 537); and, under that Act, the Chickasaw Nation sued the United States; and under Section 6 of the same, and upon the petition and motion of the United States, the Choctaw Nation was interpleaded, and made a party defendant.

In that Act Section 1 provided,

> "That jurisdiction is hereby conferred upon the Court of Claims, *notwithstanding the lapse of time or the statutes of limitation*, to hear, examine and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of *any treaty or agreement between the United States and the Choctaw and Chickasaw Nations or Tribes, or either of them.* * * *" (Italics ours);

and in Section 6 thereof, it is also provided that,

> "The Court of Claims shall have full authority by proper orders or process to bring in and make parties to such suit *any and all persons deemed by it necessary or proper to the final determination of the matters in controversy.*"

Therefore, the Choctaw Nation is a party to the suit, and cannot avoid meeting the issues arising therein.

Answer to Proposition 2.

The Choctaw Nation contends that the Choctaw and Chickasaw Nations *unequivocally consented* to allotments to the Choctaw Freedmen, in the Treaty of 1866; and that their rights thereto were *settled* by the Treaty.

Of course, the Choctaw and Chickasaw Nations *consented* that such allotments *might be made*, but under *terms and conditions*.

Those terms and conditions were that if the legislative

bodies acted, by adopting such Freedmen, and by giving them 40 acre allotments, *within two years* after the ratification of the treaty, the two Indian Nations would be entitled to the $300,000.00 consideration for the "Leased District" lands; and that, if such action be not taken *within two years*, the moneys would be held for the benefit of the Freedmen, and each who was removed from said Territory by the United States ("within *ninety days* after the expiration of the said *two years*"), was to be entitled to $100.00; and those "*remaining or returning after having been removed*" to receive nothing; and that thereafter, they "shall be on the *same footing as other citizens of the United States.*"

(Article III, Treaty of 1866, 14 Stat., 765; R. 3-4.)

No action was taken by the Choctaw and Chickasaw Nations, within the *two years;* and no Freedmen were removed by the United States; and the Freedmen acquired *no rights whatever*, under the Treaty of 1866.

The Supreme Court has so held, in the suit of *United States* v. *Choctaw and Chickasaw Nations and Chickasaw Freedmen* (193 U. S., 115).

(This subject has been fully discussed in Part II, subdivision "a", of this Brief; and any further discussion would be a mere repetition of what has already been said.)

Answer to Proposition 3.

The Choctaw Nation contends that the "Supplementary Agreement" of 1902 contains no provision that allotments to Choctaw Freedmen shall be deducted from the allotments of *Choctaw Indian citizens.*

The answer is that the *specific guarantys* to that effect are contained in the "Atoka Agreement" of 1898; and that the said "Supplementary Agreement" of 1902 contained a

reaffirmation of those guarantys (the *proviso clause*, at the close of Section 40 of that Agreement); and that it was the understanding of all the parties thereto, that such *proviso clause* was drafted and adopted for the purpose, among other things, of *saving the right* of the Chickasaw Nation to receive compensation for its *common interest* in the lands involved, as provided in the former Agreement of 1898.

(This subject is more fully discussed in Part II, subdivision "d", of this Brief; and the arguments therein contained should not be repeated here.)

Answer to Proposition 4.

The Choctaw Nation contends: *(1)* that the "Atoka Agreement" of 1898, and the "Supplementary Agreement" of 1902, contain no *guarantys* for compensating the Chickasaw Nation for its *common interest* in the lands allotted to the Choctaw Freedmen; and *(2)* that if there were such *guarantys*, their enforcement rested wholly with the United States; and that there is no liability upon the part of the Choctaw Nation.

As to the *first* part of the proposition, nothing can be added to what has been said in Part II, subdivisions "c" and "d", of this Brief.

As to the *second* part of the proposition, the contentions of the Chickasaw Nation are fully set out in Part II, subdivision "f" of this Brief, and should not be repeated here.

Answers to other contentions of the Choctaw Nation, not included in the Supplemental Brief now filed, but which are set out in its Briefs heretofore filed in support of its petition for writ of *certiorari* to the Court of Claims.

All of such Briefs formerly filed have been carefully re-examined, and it appears that the respondent, the Chickasaw Nation, has made what it deems to be sufficient answers to most of such contentions, and the same are set out in subdivisions "a" to "i", inclusive, of Part II of this Brief; and it feels that such arguments should not be repeated here.

However, there are a few of such contentions which may not have been so answered; and, in the following, such answers will now be made.

Article 26, Treaty of 1866.

The Choctaw Nation (and the United States) contend that, under Article 26 of the Treaty of 1866 (14 Stat., 769), the Choctaw Freedmen were *adopted*, and that, therefore, they became entitled to the 40 acre allotments here under consideration.

Said Article 26 is as follows:

> "The *right here given to Choctaws and Chickasaws* shall extend to all persons who have become citizens by adoption or intermarriage of said Nations, or who may hereafter become such."

First, it should be repeated (and the same has already been said and shown, throughout the preceding subdivisions of *Part II* of this Brief), that the Freedmen acquired *no right whatsoever* under the Treaty of 1866; and the Supreme Court has so held in the case of *United States* v. *Choctaw Nation, et al.* (193 U. S., 115).

What was the "*right here given*" the benefits of which are now claimed for the Choctaw Freedmen?

There are 51 Sections in that Treaty, covering numerous separate and distinct subjects.

Beginning with Article 11 and ending with Article 29, is a comprehensive plan for making 160 acre allotments in severalty to the *citizens and members* of the Choctaw and Chickasaw Nations.

These Articles relate, solely and wholly, to such allotment plan, and to no other subject.

Article 11 provided that "it is believed that the holding of said land in severalty will promote the general civilization of said Nations"; that such lands (held *in common* by the members of the Choctaw and Chickasaw Nations, under the Treaty of 1855), be surveyed and allotted, *provided* the Choctaw and Chickasaw people so agree, through their legislative councils.

Section 12 provided for maps of such surveys "for the inspection of all parties interested."

Section 13 provided for public notice of such approaching allotment, and for the registration of allottee members.

Section 14 provided that, upon the expiration of notice of ninety days, the public authorities may select one quarter section for each of the counties as seats of justice; and also as many quarter sections as may be deemed proper for schools and colleges.

Section 15 provided that every *Choctaw and Chickasaw* may select one quarter section of land, to be held in severalty.

Section 16 related to the lands and improvements which may be selected.

Section 17 related to the selection of quarter sections by missionaries.

Section 18 related to selections for children by parents.

Section 19 provided that such selections shall be made to conform to the legal subdivisions, and through the land office.

Section 20 related to proof of cultivation and improvements.

Section 21 provided that Sections 16 and 36 of each Township shall be reserved for schools.

Section 22 provided for areas of one mile square to be selected for a Military Post or Indian Agency.

Section 23 related to the keeping of records of such selections.

Section 24 related to townsites and town lots.

Section 25 related to the issuance of Patents by the President.

Section 26 is the section under consideration (and above set out in full), in which it was provided that "*the right here given to the Choctaws and Chickasaws* shall apply to all persons who have become citizens by adoption or intermarriage, or who may hereafter become such."

Section 27 related to the settlement or disputes over the right to select particular tracts.

Section 28 provided that allottees might make contiguous selections.

Section 29 provided that selections including the homestead dwelling should be inalienable for twenty one years.

While the foregoing analysis of the *allotment Articles* of the Treaty may be somewhat tedious, yet, since the Choctaw Nation (and the United States) still contend, and stress, that said Article 26 also applied to the *Choctaw Freedmen* and conferred rights upon them, a more complete answer (accompanied by such analysis) has been deemed advisable.

Can it be reasonably contended that this *allotment plan*, which applied *only to the Choctaws and Chickasaws*, and in the benefits of which only *Choctaws and Chickasaws* could share, had any application whatsoever to the *Choctaw Freedmen?*

Full membership rights, and full citizenship rights (which, under said Article 26, might also be enjoyed by *intermarried and adopted members)* was *one thing;* and the *limited membership,* and *limited allotment rights,* which the *Choctaw Freedmen might have acquired* (under Article 3 of the Treaty), was *another thing.*

The "right here given to *Choctaws and Chickasaws*" (to receive 160 acre allotments in severalty) was defined by Articles 11 to 29, inclusive.

The rights which Choctaw Freedmen *might have acquired* in limited 40 acre allotments, were defined by Article 3 of the Treaty, by no other Article or Articles.

Such rights of Choctaw Freedmen must rise or fall, and be gauged and measured, by said Article 3, which (as shown throughout this Brief) was not complied with, and the Freedmen acquired *"no rights"* whatsoever, thereunder.

The *"right here given to Choctaws and Chickasaws"* (Article 26) never ripened, since (as provided in said Article 11), the operation of the whole *allotment plan* was conditioned upon acceptance by the *"legislative councils"*; and no such action was taken, and thus, the whole *allotment plan* of the Treaty of 1866 failed.

The rights which the Freedmen *might have acquired* (under Article 3) also failed, because the same *"legislative councils"* did not act within the *two year* period fixed by said Article 3 of the Treaty; and by failing to so act, as

shown, the Choctaws and Chickasaws chose to forfeit any right to share in the $300,000.00, and to permit the same "*to be held for the use and benefit*" of said Freedmen.

Therefore, the contention of the Choctaw Nation (and the United States), that said Article 26 had any application to the Choctaw Freedmen, or conferred rights upon them by magically removing them from the limited class defined by said Article 3, and by elevating them to the full status of Choctaws and Chickasaws, is, to say the least, without merit.

Jurisdiction.

The Choctaw Nation contends that, under Jurisdictional Act of June 7, 1924 (43 Stat., 537), the Court of Claims had no jurisdiction to render a judgment against the Choctaw Nation.

The respondent, the Chickasaw Nation, contends that, under such Jurisdictional Act, the Court of Claims had ample power to render such a judgment and the United States is in full agreement with such contention.

The Chickasaw Nation and the United States agree upon this subject; and the argument on pages 23-25 of the "Brief for the United States" is adopted.

Article 46, Treaty of 1866.

The Choctaw Nation (and the United States) contend that because of the moneys *advanced* to the Choctaws and Chickasaws (under Article 46 of the Treaty of 1866), the Chickasaw Nation has been paid for its *common interest* in the lands under consideration and may not now recover.

The pertinent parts of said Article 46 are as follows:

> "Of the moneys *stipulated to be paid* to the Choctaws and Chickasaws under this Treaty for the cession

> of the leased district * * * the sum of one hundred and fifty thousand dollars shall be *advanced* and paid to the Choctaws, and fifty thousand dollars to the Chickasaws, through their respective treasurers, *as soon as practicable after the ratification of this treaty, to be repaid out of said moneys or any other moneys of said nations in the hands of the United States* * * *." (Italics ours.)

It may not be permissible to comment upon the conditions and circumstances under which such moneys were *advanced* and paid.

But the basic facts stand out with unmistakable clearness; and in recounting them, there is no purpose or intention to question the good faith of the United States, or its Commissioners, in dealing, in a realistic way, with the difficult and complicated problems which arose.

The Civil War had just ended; and the Choctaw and Chickasaw Nations had adhered to the Southern Confederacy.

The slaves had been freed; and it may be assumed that the United States Commissioners (acting, we will say, with good intentions), wished to procure for the Freedmen something more than their liberty.

Therefore, they "drove a hard bargain" with the Choctaw and Chickasaw Nations: *(1)* by securing a cession of the "Leased District" lands (comprising some 7,000,000 acres of rich lands, which now comprise the southwestern one fourth of the State of Oklahoma, for a *named or promised* consideration of $300,000.00, and which was approximately *four cents* per acre); and *(2)*, by giving the Indian Nations the option to adopt the Freedmen, and to give them 40 acres each of the *commonly owned lands*, or failing to so

act "*within two years*", to forfeit all right to receive and enjoy the $300,000.00 (Article 3, Treaty of 1866; R. 14-15).

So anxious was the United States to induce the Nations to accept the terms proposed that it was willing to *advance* and pay to them the total sum of $300,000.00 (Article 46), without awaiting the expiration of the *two years* period, so as to determine if the Indian Nations were to be entitled to the money.

It has been shown, throughout this Brief, that the Indian Nations did not accept such terms, and, therefore, they never became entitled to the money.

But, the United States "played safe" and guarded against a loss, by also providing in said Article 46, that the moneys thus *advanced* and paid were "to be *repaid out of said moneys*" (if the Indian Nations became entitled to them), "or any *other moneys* of said nations in the hands of the United States."

It may be that such moneys so advanced and paid, are still owing by the two Nations; but, it may be inquired: what relation to that subject are the issues in the instant proceeding, wherein the respondent, the Chickasaw Nation, is praying for a judgment *against the Choctaw Nation* for its *common interest* in the lands allotted to the Choctaw Freedmen?

Article 68, "Supplementary Agreement" of 1902.

The Choctaw Nation (and the United States) contend that Section 68 of the "Supplementary Agreement" of July 1, 1902 (32 Stat., 641) repealed the provision of the "Atoka Agreement" of June 28, 1898 (30 Stat., 495), whereby the Choctaw Nation and the United States *guaranteed* that the Chickasaw Nation would receive compensation for its *com-*

mon interest in the lands allotted to the Choctaw Freedmen, by a corresponding reduction of the allotments of Choctaw Indian citizens.

Such Section 68 is as follows:

> "No act of Congress or treaty provision, nor any provision of the Atoka Agreement, inconsistent with this agreement shall be in force in said Choctaw and Chickasaw Nations."

The *guaranty* contained in the said "Atoka Agreement" of 1898, was *reffirmed, and saved,* by the *proviso clause,* at the end of Section 40 of the said "Supplementary Agreement" of 1902; and that subject is fully discussed in subdivision "d", Part II, of this Brief; and such argument should not be repeated here.

If such *guaranty* in the Agreement of 1898 was so *saved and reaffirmed* by said *proviso clause* at the end of Section 40 of the Agreement of 1902, the two Agreements are in *complete harmony and not "inconsistent"* upon that subject.

How, then, may it be contended that said Section 68 of the latter Agreement repealed the guarantys contained in the former Agreement?

PART IV.

ANSWER OF RESPONDENT, THE CHICKASAW NATION, TO THE CONTENTIONS OF THE UNITED STATES.

The "BRIEF FOR THE UNITED STATES" has been carefully examined and it is thought that all contentions therein made (and with which the respondent, the Chickasaw Nation, *does not agree*) have been sufficiently answered, in *Part II*, subdivisions "a" to "i", inclusive; and in Part III, "ANSWERS TO THE CONTENTIONS OF THE CHOCTAW NATION", of this Brief.

The United States makes *two contentions* with which the respondent, the Chickasaw Nation, *agrees:* (1), that the *primary obligation*, if any, rests upon the *Choctaw Nation;* and, (2), the Court of Claims had jurisdiction to enter an affirmative judgment against the Choctaw Nation.

Since (for the reasons, and under the conditions set out in *Part II, subdivision "f"* of this Brief), the respondent, the Chickasaw Nation, is not seeking a judgment against the United States, the question arises as to why the United States is also stressing the principal contentions that would seem to concern *only the Choctaw Nation.*

The respondent, the Chickasaw Nation, can well understand the concern and anxiety of the United States, so long as the question of its liability, if any, is not settled; but, since the position of the Chickasaw Nation has been made plain, in that respect, it would seem that the United States would be willing to "stand by", and to permit the *principal parties in interest* (the Choctaw and Chickasaw Nations) to have their differences settled by the courts, "as their interests may appear".

PART V.

CONCLUSION.

In conclusion, the respondent, the Chickasaw Nation, respectfully contends that (in *Part II*, subdivisions "a" to "i", inclusive), of this BRIEF FOR THE CHICKASAW NATION, it has been shown:

(a) That the Choctaw and Chickasaw Freedmen acquired *no rights whatever*, under the Treaty of 1866, in the *commonly owned lands* of the Choctaw and Chickasaw Nations;

(b) The attempt of the Choctaw Nation (under the Choctaw Council Act of 1883, and the Act of Congress of 1882) *without the consent of the Chickasaw Nation*, conferred *no rights* on the Choctaw Freedmen, in such lands;

(c) The "Atoka Agreement" of 1898 contained the *guarantys* of both the Choctaw Nation and the United States, that the Chickasaw Nation would be compensated for its *common interest* in the lands allotted to the Choctaw Freedmen, *by a corresponding reduction of the allotments of Choctaw Indian citizens;*

(d) That the "Supplementary Agreement" of 1902 contained a *proviso clause* reaffirming and saving such guarantys contained in the "Atoka Agreement" of 1898;

(e) That the lands of the Choctaw and Chickasaw Nations are *owned in common*, and that *no part* thereof may ever be sold, or otherwise disposed of, *"without the consent of both tribes"*;

(f) That the liability sought to be enforced is the *"primary obligation"* of the Choctaw Nation, and that judgment against the Choctaw Nation has been rendered by the Court of Claims below;

(g) That the measure, and manner of computation, of *"the value"* of the lands allotted to the Choctaw Freed-

men will be: not only "the value of the lands *at the time of the taking*, but should include *such addition thereto* as may be required to produce *the present full equivalent of that value* paid contemporaneously with the taking"; and the payment, if any, in favor of the Chickasaw Nation will be for *One Fourth* of that total sum;

(h) That the Choctaw Nation has *admitted* that the Chickasaw Nation is entitled to compensation for its *common interest* in the lands allotted to the Choctaw Freedmen, and has attempted to pay the same and the United States has *admitted* that such claim of the Chickasaw Nation was worthy of consideration and settlement; and

(i) That the Chickasaw Nation has never received any compensation for its *common interest* in the lands allotted to the Choctaw Freedmen, by the reduction of the allotment of *Choctaw Indian citizens*, or by settlement otherwise.

It is also respectfully contended that (in *Parts III and IV* of this Brief, in which the contentions of the Choctaw Nation and the United States have been answered), it has been shown that Articles 26 and 46 of the Treaty of 1866 and Section 68 of the "Supplementary Agreement" of 1902, have no relation to, or bearing upon, the issues arising in the suit in the Court of Claims below, or in the instant proceeding.

Therefore, the respondent, the Chickasaw Nation, prays that the said judgment against the Choctaw Nation rendered by the Court of Claims below (R. 27-28) be affirmed, and that, in that event, the Court of Claims below be directed to render a further judgment dismissing the petition against the United States; and that if such judgment

against the Choctaw Nation be reversed, then, in that event, it be directed to render a judgment against the United States.

Respectfully submitted,

THE CHICKASAW NATION,
By MELVEN CORNISH,
Its Special Attorney.

SUPREME COURT OF THE UNITED STATES.

No. 80.—October Term, 1942.

The Choctaw Nation of Indians, Petitioner, *vs.* The United States and the Chickasaw Nation of Indians. } On Writ of Certiorari to the Court of Claims.

[March 8, 1943.]

Mr. Justice Murphy delivered the opinion of the Court.

On August 5, 1929, this suit was begun against the United States by the Chickasaw Nation under the jurisdictional Act of June 7, 1924, 43 Stat. 537.[1] By order of January 2, 1940, the Choctaw Nation was impleaded as a defendant on motion of the United States. The question is whether the Chickasaw Nation is entitled to compensation for its one-fourth interest in the common lands of the two nations allotted to the Choctaw freedmen, and, if so, who should compensate the Chickasaw Nation. The Court of Claims held that the Chickasaws were entitled to compensation and that the primary liability, the amount of which was reserved for future determination, rested upon the Choctaw Nation. Since there was no indication that it would be unable to satisfy whatever judgment might be made, the Court of Claims declined to consider or decide the liability, if any, of the United States.[2] We granted certiorari because the case was thought to raise important questions concerning the relations between the two tribes and the United States.

At the time of the Civil War the Chickasaws and the Choctaws were slave-owning tribes holding their lands in common, their respective interests being one-fourth and three-fourths. Both fought on the side of the Confederacy, and, after the cessation of hostilities, they entered into the Treaty of April 28, 1866, 14 Stat. 769, with

[1] As amended by 44 Stat. 568, and 45 Stat. 1229.

[2] 95 C. Cls. 192. The United States, while insisting that the Court of Claims correctly decided that the primary liability rests upon the Choctaw Nation, has joined that Nation in urging before this Court that no liability in fact exists.

the United States. That treaty abolished slavery among them and provided in Article III for a fund of $300,000 which was to be held in trust for the two nations and paid to them (one-fourth to the Chickasaws and three-fourths to the Choctaws) when they conferred tribal rights and privileges upon their former African slaves and gave them each forty acres of the common lands. If such laws were not adopted within two years, the fund was to be held for the benefit of those former slaves whom the United States should remove from the territory, instead of for the two nations. However, the Treaty also provided in Article XLVI that $200,000 of the fund was to be paid over immediately to the two nations and this was done. See Act of July 26, 1866, 14 Stat. 255, 259.

In 1882, neither nation having acted in accordance with the Treaty and the United States having taken no steps to remove the freedmen, an act was passed by Congress which provided that either tribe might adopt and provide for their freedmen in accordance with Article III of the Treaty. Act of May 17, 1882, 22 Stat. 68, 72-73. In 1883 the Choctaws adopted their freedmen and declared them each entitled to forty acres of the nation's lands, but no allotments were actually made.[3] Congress thereupon appropriated for the Choctaws their share of the balance of the $300,000 fund. See Act of March 3, 1885, 23 Stat. 362, 366. The Chickasaws never adopted their freedmen although they took an abortive step in that direction in 1873. See *The Chickasaw Freedmen*, 193 U. S. 115, and H. Ex. Doc. No. 207, 42d Cong., 3d Sess. Despite this failure the Chickasaws received some of the balance of their share of the original fund.[4]

In 1897 the Commission of the Five Civilized Tribes[5] negotiated the Atoka agreement with the two Indian nations. That provided for the allotment in severalty of the common tribal lands, including forty-acre allotments to the Choctaw freedmen, and contained a provision for the reduction of allotments to Choctaw Indian citizens on account of the allotments to the Choctaw freedmen, as follows:

---

[3] The act of adoption is set forth in the annual report of the Commissioner of Indian Affairs for 1884. See H. Ex. Doc. No. 1, pt. 5, 48th Cong., 2d Sess., pp. 36-37.

[4] See Act of July 26, 1866, 14 Stat. 255, 259; Act of April 10, 1869, 16 Stat. 13, 39; Act of May 17, 1882, 22 Stat. 68, 72.

[5] This Commission, commonly known as the Dawes Commission, was created by the Act of March 3, 1893, 27 Stat. 612, 645, to negotiate with the Creeks, Cherokees, Choctaws, Chickasaws and Seminoles for the extinguishment of tribal titles to land and the allotment of their lands in severalty.

"Provided that the lands allotted to the Choctaw freedmen, are to be deducted from the portion to be allotted under this agreement to the members of the Choctaw tribe, so as to reduce the allotments to the Choctaws by the value of the same and not affect the value of the allotments to the Chickasaws."

No provision was made in the original Atoka agreement for allotments to the Chickasaw freedmen, but in confirming the Atoka agreement as part of the Curtis Act of 1898 (30 Stat. 495) Congress stipulated in § 21 that forty-acre allotments were to be made to the Chickasaw freedmen as well, to be used until their rights under the Treaty of 1866 were determined in such manner as Congress might direct. It also provided in § 29 that all the lands of the two tribes were to be allotted to the members of the tribes so as to give each one a fair and equal share, and that the lands allotted to the Choctaw and Chickasaw freedmen were "to be deducted from the portion to be allotted under this agreement to the members of the Choctaw and Chickasaw tribe so as to reduce the allotment to the Choctaws and Chickasaws by the value of the same." (30 Stat. 505-06.) This confirmed agreement was approved by both tribes.

Before any allotments were made, however, a supplementary agreement was entered into by the United States and the two nations in 1902 (32 Stat. 641), which radically changed matters by providing for the allotment to each member of the two tribes of but three hundred and twenty acres instead of the aliquot allotment of all the land, as provided in the Atoka agreement. Permanent allotments of forty acres were to be made to each Chickasaw and Choctaw freedman, the remaining unallotted land was to be sold and the proceeds were to be used to equalize allotments as far as necessary, the balance being paid into the Treasury of the United States to the credit of the two tribes and distributed per capita as their other funds.[6] That agreement also contained elaborate provisions in §§ 36-40, inclusive, under a subheading entitled "Chickasaw Freedmen", for a suit in the Court of Claims to determine whether the Chickasaw freedmen had any right to allotments under the Treaty of 1866 and subsequent Congressional and tribal legislation, the United States to pay the value of those allotments to the two nations according to their respective interests if the Chickasaw freedmen were held to be without such rights.

[6] The balance was distributed according to the historic proportionate interests of the tribes, one-fourth to the Chickasaws and three-fourths to the Choctaws. Choctaw Nation v. United States, 83 C. Cls. 140, 144.

The 1902 agreement contained no express provision concerning the deduction of allotments to the Choctaw freedmen from allotments to the members of the Choctaw Nation or from that Nation's proportionate share in the common lands. Section 40 concluded with a proviso that: "nothing contained in this paragraph shall be construed to affect or change the existing status or rights of the two tribes as between themselves respecting the lands taken for allotment to freedmen, or the money, if any, recovered as compensation therefor, as aforesaid." A further provision of the agreement, § 68, declared that: "No act of Congress or treaty provision, nor any provision of the Atoka agreement, inconsistent with this agreement, shall be in force in said Choctaw and Chickasaw nations."

Following the 1902 agreement allotments were made from the common lands to the citizens and the freedmen of the two tribes. The Chickasaws received no compensation for their one-fourth interest in the common lands allotted to the Choctaw freedmen either by reduction of the allotments to the Choctaw citizens or of that tribe's proportionate share, or by any other settlement or adjustment. In the litigation authorized by §§ 36-40 of the 1902 agreement the Chickasaw freedmen were held without rights to the allotments which had been given them, and accordingly judgment was rendered against the United States for the value of their allotments in the sum of $606,936.08, which was paid to the two nations in the proportion of one-fourth to the Chickasaws and three-fourths to the Choctaws. *United States* v. *The Choctaw Nation*, 38 C. Cls. 558, affirmed *sub nom.*, *The Chickasaw Freedmen*, 193 U. S. 115; and see Act of June 25, 1910, 36 Stat. 774, 807-08.

The Court of Claims held that the Treaty of 1866 was not determinative, that the confirmed Atoka agreement required that allotments to Choctaw freedmen be deducted from the allotments to the Choctaw citizens and that the proviso to § 40 of the supplemental agreement of 1902, while "not well chosen" for the purpose, preserved this requirement. We take a different view.

The Treaty of 1866, in Article III of which the Chickasaws unconditionally consented to allotments from the common lands to Choctaw freedmen who might be adopted in conformity with the treaty requirements, is not determinative because it was superseded, before any allotments were made, by the confirmed Atoka agreement which required the deduction of all freedmen's allot-

ments, both Choctaw and Chickasaw, from those of the members of their respective tribes. The Atoka agreement was in turn supplemented by the 1902 agreement which omitted the deduction requirement of the Atoka agreement and contained not a word about deducting freedmen's allotments from the respective tribal shares in the common lands. In view of § 68 of the 1902 agreement which repealed all inconsistent provisions of the Atoka agreement, these omissions were fatal. When the differences between the Atoka agreement and that of 1902 are considered, it is clear that the deduction provision of the former was inconsistent with the latter. The Atoka agreement provided for the allotment of all the land with the members of the tribes sharing equally, and the allotments to their freedmen were to be deducted from their portion so as to reduce their allotments *pro tanto*. But under the 1902 agreement the members of both tribes were to receive definite allotments of three hundred and twenty acres instead of equal shares of the whole. If the forty-acre allotments to freedmen were deducted from the specific allotments to members of their tribes so as to reduce those allotments "by the value of the same", as required by the Atoka agreement, the members would not have received their designated acreage. Also, an attempt to shift the deduction burden from members' allotments to the proportionate shares of the tribes in the unallotted lands which were to be sold is barred by the fact that the Atoka agreement required deduction to reduce the value of member's allotments, not to reduce the respective interests of the tribes in the proceeds from the sale of unallotted lands, a provision wholly foreign to the Atoka agreement.

Further proof of the inconsistency between the 1902 agreement and the deduction requirement of the Atoka agreement is the fact that allotments to Chickasaw freedmen were made from the common lands and both tribes were to and did share, "according to their respective interests," in the ultimate recovery of the value of those lands from the United States, as promised in § 40. Only the Chickasaws should have been compensated for the allotments to their freedmen if the deduction requirement of the Atoka agreement was carried over into the 1902 agreement, whether that provision be taken as requiring the reduction of members' allotments (which it did), or as requiring the reduction of the tribes' proportionate shares in the common lands (which it did not). The circumstance that both tribes were to and did share in the award

supports the conclusion that allotments to all freedmen were to be charged to the common holdings without deduction from the respective tribal interests.

Despite these inconsistencies the Chickasaws urge that the proviso to § 40 of the 1902 agreement preserved the deduction requirement of the Atoka agreement. The terms of the proviso, however, do not support this conclusion. It does not read, as the Chickasaws would have it, that "nothing contained in this *agreement* shall be construed to affect or change the existing status or rights of the two tribes as between themselves respecting the lands taken for allotment to freedmen, or the money, if any, recovered as compensation therefor, as aforesaid." Actually the proviso concerns itself only with the possible effect of "this paragraph" which must mean §§ 36-40, grouped under the heading "Chickasaw Freedmen". That "paragraph" merely required that allotments to the Chickasaw freedmen were to be permanent, that their right to allotments be litigated in the Court of Claims, and that any resulting award be paid to both tribes by the United States. Not once in the entire "paragraph" is there a reference to Choctaw freedmen. And, since the proviso concludes with a reference to "the money, if any, recovered as compensation therefor, as aforesaid," it even more clearly was not concerned with allotments to Choctaw freedmen because no provision was made in the 1902 agreement for money recovery in the case of allotments to Choctaw freedmen. If the proviso is construed as preserving the deduction requirement, it is re-written in effect, and this should not be done.

In so construing the proviso the Court of Claims relied heavily upon certain findings of fact, set forth below,[7] to show that was the intention and understanding of the parties. Of course treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words

[7] The court found:

(a) That the Chickasaws objected to allotments to the Choctaw freedmen out of the commonly owned lands;

(b) That the Chickasaws insisted that the 1902 Agreement contain some provision saving their rights not to have allotments to the Choctaw freedmen made at the expense of the Chickasaws' interest in the common lands, and after a conference with the assistant attorney general who was legal adviser to the Department of the Interior, it was agreed that the proviso to § 40 be included to protect their interests;

(c) That the Choctaw Nation, prior to the entry of final judgment on January 24, 1910, in the proceeding authorized by §§ 36-40 (see 38 C. Cls. 558; 193 U. S. 115), filed an "'Application for Additional Decree'" in which it set out

to the history of the treaty, the negotiations, and the practical construction adopted by the parties. *Factor* v. *Laubenheimer*, 290 U. S. 276, 294-95; *Cook* v. *United States*, 288 U. S. 102, 112. Especially is this true in interpreting treaties and agreements with the Indians; they are to be construed, so far as possible, in the sense in which the Indians understood them, and "in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people." *Tulee* v. *Washington*, 315 U. S. 681, 684-85. See also *U. S.* v. *Shoshone Tribe*, 304 U. S. 111, 116; *Choctaw Nation* v. *United States*, 119 U. S. 1, 28. But even Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties. Cf. *United States* v. *Choctaw &c. Nations*, 179 U. S. 494, 531-33; *United States* v. *Mil. Lac Chippewas*, 229 U. S. 498, 500. Here the words of the proviso are inapposite to the proposed construction and we do not believe the findings are enough to warrant departing from the language used. The findings are merely findings as to evidence. There is no finding as to the ultimate fact whether or not the two tribes intended to agree on something different from that appearing on the face of the 1902 agreement. Without such a finding the agreement must be interpreted according to its unambiguous language. Furthermore, if we were to find the ultimate fact, we seriously doubt whether we could discover from these evidentiary findings what the agreement among the two tribes and the United States was, if other than that expressed in the 1902 agreement. For the most part the findings are concerned with the assertions and claims of the Chickasaws. The only indication that the Choc-

that the Chickasaws were entitled to compensation for their proportionate interest in the commonly owned lands allotted to the Choctaw freedmen and requested the court to enter a supplemental decree deducting from their proportionate share of the judgment one-fourth of the value of the jointly held lands allotted to the Choctaw freedmen and add that amount to the amount to be apportioned to the Chickasaw Nation under the judgment. (No action was taken on this request.)

(d) That on March 11, 1910, the Governor of the Chickasaw Nation wrote to the Commissioner of Indian Affairs requesting permission to employ separate counsel for the Chickasaw Nation and setting out in support of this request the Chickasaws' claim for compensation for lands allotted to the Choctaw freedmen out of the common domain of the two nations without the consent of the Chickasaws and pointed out that the Chickasaws had had no attorney to represent them at the time that judgment was entered in the suit brought pursuant to the Supplemental Agreement. The Commissioner recommended denial of the request on the ground that in view of the admission of the Choctaws in their request for an additional decree, judicial action did not seem to be necessary to settle the controversy.

taws ever shared those views at any time is their request for an "Additional Decree" upon which no action was ever taken.

Equitable considerations do not dictate a different result. By the Treaty of 1866 both tribes shared in the $200,000 advance payment for the adoption of their freedmen and the allotment of forty acres of land to them. Even though the Chickasaws never adopted their freedmen, they did receive a portion of their share of the balance of the original $300,000 treaty fund.[8] When they contested the right of their freedmen to allotments the United States explicitly promised in the 1902 agreement to reimburse them if there were an adverse judicial decision. The agreement contained no promise to reimburse them for allotments to Choctaw freedmen, and in view of the specific promise with regard to their own freedmen, none should be implied.

We conclude that allotments from the common tribal lands were to be made under the 1902 agreement to Choctaw freedmen without deducting those allotments from the Choctaw Nation's share of the lands or otherwise compensating the Chickasaws for their interest in the lands so allotted. Since no liability exists, it is unnecessary to consider whether the Choctaw Nation or the United States is primarily liable, or whether the Court of Claims had power under the jurisdictional act (43 Stat. 537) to place liability upon the Choctaw Nation.

The judgment below is reversed and the cause remanded with instructions to dismiss the petition.

It is so ordered.

Mr. Justice RUTLEDGE took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

---

[8] See note 4, *ante*.